WU SHU CHEN & ANOR

v.

RAJA ZAINAL ABIDIN RAJA HUSSIN

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
NH CHAN JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: J-02-386 OF 1995]
30 APRIL 1997

LAND LAW: *Caveat - Grounds for entry of - Form 19B - Sufficiency - Whether to show caveatable interest - Whether to state sufficiently nature of claim - National Land Code 1965, ss. 323, 327*

LAND LAW: *Caveat - Private caveat - Removal - Whether respondent an aggrieved person - Three-stage approach by Court - Whether there was a caveatable interest - Triable issues - Balance of convenience - National Land Code 1965, ss. 323, 327*

LAND LAW: *Indefeasibility of title and interests - Vesting order - Effect of - Whether conferring indefeasibility of title - Whether would extinguish other unregistered equitable interest - Land subject to acquisition under Land Acquisition Act 1960 - Whether proper for Court to grant vesting order - National Land Code 1965, ss. 327, 340, 417, 420*

LAND LAW: *Sale of land - Trust - Vendor accepting full purchase price - Valid and registrable transfer of land in due form executed - Whether vendor a bare trustee - Whether purchaser the beneficial owner*

LAND LAW: *Sale of land - Trust - Allegation that registered properietor holding land on trust - Trust instrument not deposited with Registrar of Titles - Registered proprietor not registered as trustee - Whether material omissions - Whether negligent - Whether prejudicial - Whether estopped from asserting trusteeship - National Land Code 1965, ss. 323, 327, 344*

LAND LAW: *Land, recovery of - Accruel of cause of action - Commencement of limitation period - Whether action time-barred - Whether appellants guilty of laches - Whether negligent - National Land Code 1965, ss. 323, 327, 344 - Limitation Act 1953, s. 9*

Long Yoke Wee ('Long') in this case was the registered proprietor of three pieces of land in Pulai, Johor ('the said land') and was holding the same free of incumbrances since 1959. In 1989, Goh Keng How ('Goh'), the managing partner of a firm called Mingshu Syndicate, lodged a caveat against the said

land. In his statutory declaration to support the caveat in Form 19B, Goh affirmed that *"the grounds of our claim to the land are that we claim a caveatable interest on the land referred to in the schedule hereto* ***by virtue of certain documents*** *which clearly indicate our interest in the said land"*.

By an agreement dated 25 June 1993, Long sold the said land to the respondent for RM8 million. The respondent paid the purchase price in full whereupon Long, after promising to remove Goh's caveat, executed Form 14A to transfer the said land to the respondent and surrendered to the latter the issue document of title thereof.

On 19 October 1994, Mingshu Syndicate, in an attempt to recover the said land, filed a suit against Long and the respondent (civil suit no. 22-328-1994), alleging in essence that Long had executed a trust deed in 1963 wherein he acknowledged to holding the said land in trust for Mingshu Syndicate. Goh also alleged that Long had agreed to deliver but failed to deliver, by 4 November 1968, a blank transfer form relating to the said land. The evidence showed, however, that, no trust instrument whatsoever had been deposited by Goh with the Registrar of Titles, and Long, thus, had never been registered as a trustee. Also, despite Long's alleged failure to deliver the blank transfer form way back in 1968, nothing was done by Goh to address the issue.

The facts also showed that, after the sale transaction aforesaid had been completed, the said land had become subject to an acquisition under the Land Acquisition Act 1960 (*vide* Johore Bahru High Court originating summons no. 24-122-1995), and pursuant to that, a compensation sum of RM25,892,000 had been deposited into Court by the acquiring authority. This apart, it was not in dispute that not long after the filing of suit no. 22-328-1994, the second appellant ('Ho'), another partner of Mingshu Syndicate, had also filed a caveat against the said land *"on substantially the same grounds as the applicant Goh Keng How"*.

The respondent, who was allowed to intervene in originating summons no. 24-440-1994 filed by the appellants, applied to the High Court (i) to remove Goh's and Ho's caveats (ii) for a vesting order under s. 417 National Land Code ('the Code') (iii) for the compensation sum be paid to him. The learned Judge ruled that the respondent in the circumstances was a *bona fide* purchaser of the said land, and in the event granted the application in all its terms. The appellants appealed and contended (i) that the respondent was not a bona fide purchaser of the said land and hence was not an aggrieved person within the meaning of s. 327(1) of the Code (ii) that the entire transaction smacked of fraud and collusion (iii) that it was wrong for the learned Judge to have granted a vesting order when the said land was subject to an acquisition exercise under the Land Acquisition Act. Goh has since died whereupon the sole executrix of his estate, Wu Shu Chen, prosecuted his appeal.

Before the learned appellate Judges, the primary issues that arose were:

(i) whether the respondent is an aggrieved person within the meaning of s. 327(1) of the Code.

(ii) whether the caveats should be removed, and hence, whether the appellants and the real claimants, Mingshu Syndicate, had any caveatable interest in the said land.

Held:
Per Mokhtar Sidin JCA

[1] The word 'aggrieved' must be given its ordinary meaning. To be aggrieved means one is dissatisfied with or adversely affected by a wrongful act of someone. An aggrieved person is therefore a person whose legal right or interest is adversely affected by the wrongful act or conduct of another person or body.

[1a] On the facts, it is clear that Long was only a bare trustee holding the bare legal title to the said land on trust for the respondent who had become the beneficial owner thereof. The respondent, in the event, must be held to be a *bonafide* purchaser for valuable consideration and that he was an aggrieved person entitled to make his application to the Court under s. 327(1) of the Code for the removal of Goh's caveat and Ho's caveat.

[2] Fraud and conspiracy to defraud must be proved beyond reasonable doubt, and fraud must be actual fraud. There is no evidence that the respondent had committed actual fraud in his transaction. Grave suspicion by the appellants is no proof of fraud.

[3] The three-stage approach propounded in *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng* applies in the hearing of an application by an aggrieved person under s. 327(1) of the Code for the removal of a private caveat. The Court, hence, must examine the grounds as stated in Form 19B and determine its sufficiency, then determine whether the caveator has raised by his affidavit a serious question to be tried, and if these two hurdles had been crossed, determine where the balance of justice lay.

[3a] Goh's application in Form 19B had not disclosed what the so called 'certain document' was. He failed to show the instrument of trust in his caveat and any person making a search on his caveat application form would have no notice of what the claim could be. This was as good as having nothing at all to show the caveatable interest that he or Mingshu Syndicate claimed.

[3b] There is no doubt that Goh, Ho or Mingshu Syndicate had no caveatable interest in the said land. Failure by a caveator such as Goh or Ho to cross the first hurdle aforesaid, in any case, would be sufficient for the Court to remove his caveat and dismiss his appeal.

[4] There is nothing in the Code or the Land Acquisition Act 1960 to prohibit the Court from making a vesting order consonant with the justice of the case. Section 327(1) of the Code permits the Court to make such other just order and under s. 417 the Court may by order direct the Registrar of Title to give effect to such order. Section 420 makes provision for the registration of a vesting order.

[4a] The learned Judge was right in the circumstances to make the vesting order. Clearly, had there been no caveats entered by Goh and Ho, the transfer of the said land in Form 14A would have been registered in favour of the respondent in the usual way.

[4b] The effect of a vesting order is that the said land is beneficially owned by the respondent. Thus, registration of the vesting order with effect from 28 July 1995 confers indefeasibility of title on the respondent under s. 340 of the Code and defeat and extinguish other unregistered equitable interest in respect of the said land. The acquisition of the land by the appropriate authority does not take away the vested right of the respondent in the said land or any proceeds of acquisition or sale arising thereof.

[5] Although the vesting order would make the respondent the beneficial owner of the said land, the learned Judge's order of payment of the award to the respondent in originating summons no. 24-440-1994 from which this appeal arose, ought to be set aside. The proper procedure is for the respondent to apply to the Johore Bahru High Court for an order for payment out to him in the other appropriate originating summons no. 24-122-1995 in which, on the application of the Land Administrator, Johore Bahru, the order for payment into Court of the compensation award of RM25,892,000 was made for the compulsory acquisition of the land.

[6] This appeal should also be dismissed on the grounds that:

(i) Under s. 43 of the Code, a partnership like Mingshu Syndicate is not a person or body which can hold land in its own name. Mingshu Syndicate, in any case, must be considered as dissolved as of 18 May 1965 when the first death of a partner occured. This is the clear effect of s. 35(1) of the Partnership Act 1961.

(ii) The omission to register Long as trustee and the failure to deposit his trust instrument is a material omission under the Torrens system. It has resulted in a serious prejudice to the respondent in that he would never know that Long was a trustee for Mingshu Syndicate. This omission on the part of Mingshu must be held against it.

(iii) Mingshu's cause of action for the recovery of the said land accrued when Long failed or defaulted to deliver the transfer and the issue document of title to the said land on 4 November 1968 when time began to run. In order to prevent limitation from setting in, Mingshu Syndicate, asuming it had legal capacity, must institute its action within twelve years from 4 November 1968. This it failed to do. The claim of the appellants and Mingshu Syndicate in their civil suit no. 22-328-1994 was filed some 14 years out of time and was therefore barred by limitation *vide* s. 9 of the Limitation Act 1953.

(iv) Under s. 89 of the Code, the register document of title is conclusive evidence of title. Anyone making a title search in the registry would find Long as the registered proprietor, free of incumbrances and free of any trust, except for the defective caveats of Goh and Ho. They failed to state in their application that the said land was subject to a trust and they are now estopped from relying on the trust against the respondent who would be prejudiced or misled by the conduct of Goh and Ho.

(v) Goh, Ho and Mingshu Syndicate are also barred by laches from asserting their interest in the said land as against that of the respondent. They are also guilty of negligence or omission in arming Long with full power to deal with the said land as proprietor over an incredibly long period. If Mingshu Syndicate had any prior equity in the said land, it must be postponed to that of the respondent's.

(vi) On the facts, no trial is necessary to determine if the respondent is an aggrieved person. There is also no need to have a trial on the dissolution of Mingshu Syndicate on the deaths of its partners as the facts are not in dispute and the law is clear. There is further no need for a trial to determine the issue of limitation as suit no 22-328-1994 had been filed some 14 years out of time. There is thus no serious question to be tried in the civil suit and the question of balance of convenience does not arise.

[Appeal dismissed. Vesting order of trial Judge affirmed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

UNDANG-UNDANG TANAH: *Kaveat - Alasan bagi kemasukan - Borang 19B - Kecukupan - Samada perlu menunjukkan kepentingan yang boleh dikaveat - Samada perlu menyatakan secukupnya sifat tuntutan - Kanun Tanah Negara 1965, ss. 323, 327*

UNDANG-UNDANG TANAH: *Kaveat - Kaveat persendirian - Penyingkiran - Samada responden seorang yang terkilan - Pendekatan tiga-peringkat oleh Mahkamah - Samada wujud kepentingan yang boleh dikaveat - Isu yang boleh dibicarakan - Pertimbangan keadilan - Kanun Tanah Negara 1965, ss. 323, 327*

UNDANG-UNDANG TANAH: *Perintah letakhak - Kesan - Samada mengurniakan hakmilik tak boleh sangkal - Samada melenyapkan lain-lain kepentingan ekuiti tidak berdaftar - Tanah tertakluk kepada tindakan pengambilan di bawah Akta Pengambilan Tanah 1960 - Samada wajar bagi Mahkamah memberikan perintah letakhak - Kanun Tanah Negara 1965, ss. 327, 344, 417, 420*

UNDANG-UNDANG TANAH: *Amanah - Penjualan tanah - Penjual menerima sepenuhnya harga belian - Borang pindahmilik tanah yang sah dan boleh didaftarkan dimeterai - Samada penjual 'bare trustee' - Samada pembeli pemilik benefisial*

UNDANG-UNDANG TANAH: *Amanah - Penjualan Tanah - Pengataan bahawa pemilik berdaftar memegang tanah atas amanah - Instrumen amanah tidak disimpan dengan Pendaftar Hakmilik - Pemilik berdaftar tidak didaftarkan sebagai pemegang amanah - Samada peninggalan yang material - Samada cuai - Samada memprejudiskan responden - Kesan - Samada diestop dari menekankan 'trusteeship' - Kanun Tanah Negara 1965, ss. 323, 327, 344*

UNDANG-UNDANG TANAH: *Tanah, mendapatkan kembali - Keakruan kausa tindakan - Permulaan tempoh penghadan - Samada tindakan dihalang oleh masa - Samada perayu bersalah kerana 'laches' - Samada cuai - Kanun Tanah Negara 1965, ss. 323, 327, 344 - Akta Penghadan 1953, s. 9*

Long Yoke Wee ('Long') dalam kes ini adalah pemilik berdaftar kepada tiga bidang tanah di Pulai, Johor ('tanah tersebut') dan telah memegang tanah tersebut tanpa apa-apa sekatan sejak tahun 1959. Pada tahun 1989, Goh Keng How ('Goh'), rakan kongsi dan pengurus sebuah firma yang bernama Mingshu Syndicate, telah memasukkan kaveat terhadap tanah tersebut. Di dalam akuan berkanunnya bagi menyokong kaveat dalam Borang 19B, Goh mengesahkan bahawa "Alasan bagi tuntutan kami terhadap tanah tersebut adalah bahawa kami menuntut kepentingan yang boleh dikaveat di atas tanah yang dirujuk

di dalam jadual di sini berdasarkan beberapa dokumen yang menunjukkan dengan jelasnya kepentingan kami di dalam tanah tersebut".

Melalui satu perjanjian bertarikh 25 June 1993, Long telah menjual tanah tersebut kepada responden dengan harga RM8 juta. Responden telah membayar sepenuhnya harga belian bilamana Long, setelah mengakujanji untuk mengeluarkan kaveat Goh, memeterai Borang 14A untuk memindahmilik tanah tersebut kepada responden dan menyerahkan kepada responden dokumen hakmilik tanah tersebut.

Pada 19 Oktober 1994, Mingshu Syndicate, dalam usahanya untuk mendapatkan semula tanah tersebut, telah mengambil tindakan guaman terhadap Long dan responden (guaman no. 22-328-1994), mengatakan secara pentingnya bahawa pada tahun 1963 Long telah memeterai satu suratikatan amanah di mana beliau mengaku telah memegang tanah tersebut sebagai amanah untuk Mingshu Syndicate. Goh juga menyatakan bahawa Long telah bersetuju untuk menyerahkan kepadanya borang kosong pindahmilik pada 4 November 1968 tetapi telah gagal berbuat demikian. Keterangan, bagaimanapun, menunjukkan, bahawa Goh tidak pernah menyerahsimpan apa-apa suratcara amanah dengan Pendaftar Hakmilik, dan Long, dengan itu, tidak pernah didaftarkan sebagai pemegang amanah. Juga, walaupun Long gagal menyerahkan borang kosong pindahmilik sejak 1968 lagi, tidak ada apa-apa tindakan diambil oleh Goh untuk menangani perkara tersebut.

Fakta juga menunjukkan bahawa, selepas transaksi penjualan di atas disempurnakan, tanah tersebut telah menjadi tertakluk kepada satu pengambilan di bawah Akta Pengambilan Tanah 1960 (melalui saman pemula Mahkamah Tinggi Johor Bahru no. 24-122-1995), dan ekoran itu, pampasan berjumlah RM25,892,000 telah diserahsimpan di Mahkamah oleh pihak berkuasa yang mengambil tanah. Selain itu, adalah jelas bahawa tidak lama selepas pemfailan guaman no. 22-328-1994, perayu kedua ('Ho'), seorang lagi rakan kongsi Mingshu Syndicate, telah juga memfailkan kaveat terhadap tanah tersebut "atas alasan-alasan yang sama seperti pemohon Goh Keng How"

Responden, yang diberi izin untuk mencelah dalam saman pemula no. 24-440-1994 yang difailkan oleh perayu, memohon kepada Mahkamah Tinggi (i) untuk menyingkir kaveat Goh dan Ho (ii) untuk satu perintah letakhak di bawah s. 417 Kanun Tanah Negara ('Kanun') (iii) supaya jumlah pampasan dibayar kepadanya. Hakim yang bijaksana memutuskan bahawa responden dalam halkeadaan yang wujud adalah seorang pembeli *bona fide* tanah tersebut, dan atas alasan itu telah membenarkan permohonan dalam semua terma-termanya. Perayu merayu dan menghujah (i) bahawa responden bukanlah pembeli *bona fide* tanah tersebut dan oleh kerana itu bukan seorang yang terkilan menurut maksud s. 327(1) Kanun (ii) bahawa keseluruhan transaksi diselimuti oleh

penipuan dan pakatan (iii) bahawa ianya salah bagi Hakim yang bijaksana untuk membenarkan perintah letakhak apabila tanah tersebut sedang tertakluk kepada suatu proses pengambilan di bawah Akta Pengambilan Tanah. Goh telah pun meninggal dunia dan berikutan itu wasi tunggalnya, Wu Shu Chen, meneruskan rayuannya.

Di hadapan Hakim-hakim rayuan yang bijaksana, isu-isu utama yang berbangkit ialah:

(i) samada responden seorang yang terkilan menurut maksud s. 327(1) Kanun.

(ii) samada kedua-dua kaveat di sini patut dikeluarkan, dan oleh itu, samada perayu-perayu dan penuntut yang sebenar, Mingshu Syndicate, mempunyai kepentingan yang boleh dikaveatkan dalam tanah tersebut.

Diputuskan:
Oleh Mokhtar Sidin HMR

[1] Perkataan 'terkilan' mestilah diberikan maknanya yang biasa. Merasa terkilan bermakna bahawa seseorang itu tidak berpuashati dengan atau telah dimudaratkan oleh tindakan seseorang lain. Oleh itu, seorang yang terkilan adalah orang yang hak atau kepentingan undang-undangnya telah dimudaratkan oleh tindakan atau kelakuan salah seseorang atau badan yang lain.

[1a] Di atas fakta, ianya jelas bahawa Long hanyalah seorang bare trustee yang memegang hakmilik di sisi undang-undang kepada tanah tersebut bagi pihak responden yang telah menjadi pemilik benefisialnya. Responden, dengan itu, mestilah dianggap sebagai seorang pembeli *bona fide* untuk balasan bernilai dan beliau adalah seorang yang terkilan yang berhak untuk membuat permohonan kepada Mahkamah di bawah s. 327(1) Kanun untuk menyingkirkan kaveat-kaveat Goh dan Ho.

[2] Penipuan dan pakatan untuk menipu mestilah dibuktikan secara melampaui keraguan yang munasabah dan penipuan mestilah penipuan yang sebenar. Tidak terdapat keterangan bahawa responden telah melakukan penipuan sebenar dalam transaksi di sini. Syak yang mendalam oleh perayu bukan merupakan bukti penipuan.

[3] Pendekatan tiga-peringkat yang disebut dalam kes *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng* adalah terpakai kepada permohonan orang yang terkilan di bawah s. 327(1) Kanun untuk menyingkirkan kaveat. Oleh yang demikian, Mahkamah mestilah memeriksa alasan-alasan yang dicatit dalam Borang 19B untuk menentukan kecukupannya, selepas

mana ianya harus pula menentukan samada pengkaveat telah membangkitkan melalui afidavitnya persoalan serius yang boleh dibicarakan, dan sekiranya kedua-dua halangan ini dilepasi, menentukan dimanakah letaknya imbangan keadilan.

[3a] Permohonan Goh dalam Borang 19B tidak menjelaskan apakah yang dipanggil 'dokumen tertentu' itu. Beliau gagal menunjukkan instrumen amanah dalam kaveatnya dan seseorang yang membuat selidikan ke atas borang permohonan kaveatnya tidak akan mengetahui apakah dia tuntutan yang dikatakan itu. Ini samalah seperti tidak mempunyai apa-apa untuk menunjukkan kepentingan yang boleh dikaveat yang mana Mingshu Syndicate atau Goh dikatakan sebagai telah memiliki.

[3b] Adalah nyata bahawa Goh, Ho ataupun Mingshu Syndicate tidak mempunyai kepentingan yang boleh dikaveat dalam tanah tersebut. Walau apa pun, kegagalan oleh pengkaveat seperti Goh atau Ho untuk melepasi halangan pertama di atas sudah memadai bagi Mahkamah mengeluarkan kaveat dan menolak rayuan mereka.

[4a] Dalam halkeadaan kes, Hakim yang bijaksana adalah betul dalam memberikan perintah letakhak. Adalah jelas bahawa, tanpa kaveat Goh dan Ho, pindahmilik tanah tersebut dalam Borang 14A akan didaftarkan dengan nama responden dengan cara yang biasa.

[4] Tidak ada suatu pun di dalam Kanun ataupun Akta Pengambilan Tanah 1960 yang melarang Mahkamah dari memberi perintah letakhak yang sesuai dengan keadilan kes. Seksyen 327(1) Kanun membolehkan Mahkamah membuat perintah selainnya yang adil dan di bawah s. 417 Mahkamah boleh melalui perintah mengarahkan Pendaftar Hakmilik Tanah untuk memberi kesan kepada perintahnya yang sedemikian. Seksyen 420 pula membuat peruntukkan tentang pendaftaran sesuatu perintah letakhak.

[4b] Kesan suatu perintah letakhak adalah bahawa tanah tersebut dimiliki secara benefisialnya oleh responden. Oleh yang demikian, pendaftaran perintah letakhak pada 28 Julai 1995 tersebut telah menganugerahkan kepada responden suatu hak tak boleh sangkal di bawah s. 340 Kanun serta melenyapkan segala kepentingan ekuiti tak berdaftar yang lainnya. Pengambilan tanah tersebut oleh pihak berkuasa tertentu tidak melupuskan hak responden di dalam tanah tersebut ataupun haknya kepada hasil pengambilan atau penjualan tanah tersebut.

[5] Walaupun perintah letakhak menjadikan responden sebagai pemilik benefisial tanah tersebut, perintah Hakim yang bijaksana yang memerintahkan pembayaran pampasan kepada responden di dalam saman

pemula no. 24-440-1994, dari mana rayuan ini berbangkit, perlu diketepikan. Prosedur yang betul ialah untuk responden memohon kepada Mahkamah Tinggi Johor Bahru untuk perintah pembayaran kepadanya di dalam saman pemula no. 24-122-1995 di mana, ekoran permohonan Pentadbir Tanah, Johor Bahru, perintah pembayaran ke dalam Mahkamah pampasan berjumlah RM 25,892,000 telah dibuat bagi pengambilan wajib tanah tersebut.

[6] Rayuan ini juga harus ditolak atas alasan bahawa:

(i) Di bawah s. 43 Kanun, suatu perkongsian seperti Mingshu Syndicate bukanlah orang atau badan yang dibenarkan untuk memegang tanah atas namanya sendiri. Mingshu Syndicate, walau apa pun, mestilah dianggap sebagai telah terbubar pada 18 Mei 1965 bilamana kematian pertama berlaku dikalangan rakan kongsinya. Ini adalah kesan jelas s. 35(1) Akta Perkongsian 1961.

(ii) Kegagalan untuk mendaftar Long sebagai pemegang amanah dan serta kegagalan untuk menyerahsimpan instrumen amanahnya adalah peninggalan yang material di dalam sistem Torrens. Ianya telah menyebabkan prejudis yang memudaratkan kepada responden dalam ertikata beliau tidak mungkin mengetahui bahawa Long adalah pemegang amanah kepada Mingshu Syndicate. Akibat peninggalan ini mestilah ditanggung oleh Mingshu sendiri.

(iii) Kausa tindakan bagi pengambilan semula tanah tersebut oleh Mingshu menjadi terakru apabila Long gagal atau enggan menyerahkan pindahmilik dan dokumen hakmilik tanah tersebut pada 4 November 1968 bilamana masa mula berjalan. Untuk menghalang had masa dari berkuatkuasa, Mingshu Syndicate, diandaikan ia mempunyai hak di sisi undang-undang, mestilah memulakan tindakan dalam masa dua belas tahun dari 4 November 1968. Ini gagal dilakukannya. Tuntutan perayu dan Mingshu Syndicate dalam guaman no. 22-328-1994 hanya difailkan 14 tahun melebihi masa dan dengan itu dihalang oleh had masa di bawah s. 9 Akta Penghadan 1953.

(iv) Di bawah s. 89 Kanun, daftar dokumen hakmilik adalah bukti muktamad bagi hakmilik. Sesiapa sahaja yang membuat selidikan di pendaftaran akan mendapati bahawa Long adalah pemilik berdaftar, bebas dari apa-apa sekatan dan amanah, kecuali kaveat cacat yang diserahsimpan oleh Goh dan Ho. Mereka berdua gagal menyatakan dalam permohonan mereka bahawa tanah tersebut adalah tertakluk kepada amanah dan mereka kini diestop dari bergantung kepada amanah tersebut bagi menentang responden yang jelas diprejudis atau dikelirukan oleh kelakuan Goh dan Ho.

(v) Goh, Ho dan Mingshu Syndicate adalah juga dihalang oleh kelewatan dan sikap sambil lewa mereka dari menuntut hak-hak mereka terhadap responden. Mereka juga bersalah kerana cuai atau peninggalan dalam ertikata mereka telah mempersenjatakan Long dengan kuasa penuh untuk berurusan dengan tanah tersebut sebagai pemilik dalam tempoh waktu yang terlalu panjang. Sekiranya Mingshu Syndicate mempunyai apa-apa ekuiti terdahulu di dalam tanah tersebut, ekuitinya itu mestilah diletakkan dibelakang ekuiti responden.

(vi) Di atas fakta, tiada perbicaraan diperlukan untuk menentukan samada responden seorang yang terkilan. Juga tiada perbicaraan diperlukan berhubung isu pembubaran Mingshu Syndicate berikutan kematian rakan-rakan kongsinya oleh kerana fakta adalah tidak dipertikaikan dan undang-undangnya adalah jelas. Selanjutnya tiada perbicaraan diperlukan untuk menentukan isu had masa oleh kerana guaman no. 22-328-1994 jelas difailkan 14 tahun terlebih masa. Dengan itu, tidak ada isu penting yang harus dibicarakan dalam guaman ini dan soal perimbangan keselesaan tidak timbul samasekali.

[Rayuan ditolak. Perintah letakhak Hakim perbicaraan disahkan.]

Cases referred to:

P.J.T.V. Denson (M) Sdn Bhd v. Roxy (Malaysia) Sdn Bhd [1980] 2 MLJ 136 ***(refd)***
Saminathan v. Pappa [1981] 1 MLJ 12 ***(refd)***
Tai Lee Finance Co Sdn Bhd v. Official Assignee [1983] 1 MLJ 81 ***(refd)***
Aik Ming (M) Sdn Bhd v. Chang Ching Chuen [1995] 3 CLJ 639 ***(refd)***
Temenggong Securities Ltd v. Registrar of Titles, Johor [1974] 2 MLJ 45 ***(foll)***
Ng Keng Yeow v. Chiah Ah Foo [1987] 2 MLJ 330 ***(foll)***
Yeong Ah Chee v. Lee Chong Hai [1994] 3 CLJ 21 ***(foll)***
Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd [1996] 2 CLJ 561 ***(foll)***
Attorney-General of Gambia v. Pierre Sarr N'Jie [1961] AC 617 ***(foll)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng [1995] 3 CLJ 520 ***(foll)***
Murugappa Chettiar Lakshmanan v. Lee Teck Mook [1995] 1 CLJ 545 ***(refd)***
Bachan Singh v. Mahinder Kaur & Anor [1956] MLJ 97 ***(foll)***
Khoo Yoke Wah v. Lee Choon Yam Holdings Sdn Bhd [1991] 1 CLJ 663 ***(refd)***
Mat Shah b. Mohamed v. Foo Say Meng [1984] 1 MLJ 237 ***(refd)***
Madan Lal v. Ho Siew Bee [1983] 1 MLJ 105 ***(cit)***
Lindsay Petroleum Company v. Prosper Armstrong Hurd [1874] 5 LR 221 ***(foll)***
Allcard v. Skinner [1887] 36 Ch. D 145 ***(foll)***
Abigail v. Lapin [1934] AC 491 ***(foll)***
Teh Bee v. Maruthamuthu [1977] 2 MLJ ***(cit)***
Sim Kwang Mui Ivy v. Goh Peng Khim [1995] 1 SLR 186 ***(foll)***
Eng Mee Yong v. Letchumanan [1979] 2 MLJ 212 ***(refd)***

Legislation referred to:
Johor Land Enactment, s. 72(i)
Land Acquisition Act 1960, s. 23
Limitation Act 1953, s. 9
National Land Code 1965, ss. 43, 89, 323(2), (3), 326, 327(1), 340, 344(3), 383(1), 417, 420
Partnership Act 1961, s. 35(1)

[Appeal from High Court Malaya, Johor Bahru; Originating Summons No: 24-440-1994]

For the appellants - Cecil Abraham (Rosita Yeo & D Bhaskaran with him); M/s Yeo & Co
For the respondent - Wong Kim Fatt (Christina Chia & Khor Loke Yew with him); M/s Christina Chia Ng & Partners

JUDGMENT

Mokhtar Sidin JCA:

The appellants, Madam Wu Shu Chen (as the sole executrix of the Estate of Goh Keng How, deceased) and Ho Choo Wing ('Ho') being dissatisfied with a part only of the decision of the Court of Appeal given on 19 November 1996, have applied to the Federal Court for the following orders:

1. That leave be given to the applicants by this Honourable Court to appeal against such part only of the order of the Court of Appeal dated the 19 November 1996 whereby the Court of Appeal ordered that the Vesting order made by YA Hakim Dato Abdul Malik Ishak made in his Order dated 12 June 1995 vesting the land Lot 3523, held under Grant No. 21957, Mukim of Pulai, District of Johor Bahru, in favour of the respondent herein be affirmed.

2. That the applicants be given seven (7) days from the date of this Order to file and serve the Notice of Appeal.

3. That the costs of this application be costs in the cause.

4. That this Honourable Court do grant such further or other relief that it may deem fit and just to grant in the circumstances.

Background Of The Case

The case originated in the High Court at Johor Bahru where in Originating Summons No. 24-440-1994 the respondent, Raja Zainal Abidin bin Raja Hussin, was granted leave to intervene and was made the first defendant and the appellant Ho the second defendant. The plaintiff in the Originating Summons was originally one Goh Keng How ('Goh'), who died on 8 May 1995 at the age of 72 (see death certificate at Appeal Record, p. 592). After

Goh's death, his wife Madam Wu Shu Chen was substituted as the sole executrix of his Estate. She is the first appellant in this appeal in place of Goh, and Ho is the second appellant. Goh on 14 January 1989 entered a private caveat Serial No. 193/89 as the managing partner of Mingshu Syndicate claiming a caveatable interest in the land in question, i.e. Lot No. 3523, Grant No. 21957, Mukim of Pulai, District of Johor Bahru, measuring in area 399 acres 3 roods 20 poles ('the said Land'). Goh's caveat was subsequently extended by *ex parte* order of Court dated 20 June 1994 made in his application by way of the aforesaid Originating Summons. Ho also entered a private caveat Serial No. 6759/94 on 20 June 1994 against the said land as a partner of Mingshu Syndicate. The respondent, after he (in Prayer 1) and Ho (in Prayer 2) having been made parties to the said Originating Summons No. 24-440-1994 upon the respondent's application, sought the following orders (A.R. 104-105), supported by his affidavit of 16 July 1994 (A.R. 297-304):

> 3. The *Ex parte* Order dated 20 June 1994 granted by Yang Arif Tuan Hakim Dato' Hj Arifin bin Hj. Jaka under this Originating Summons extending the private caveat registered under Serial No. 193/89, Jilid 352, Folio 86 ('the said private caveat'), entered by the applicant Goh Keng How against the said land be set aside and the said private caveat be removed forthwith by the Registrar of Titles.
>
> 4. In the event the Prayer 2 is granted, the private caveat registered under Serial No. 6759/94 Jilid 895 Folio 58 entered by the second defendant, Ho Choo Wing, against the said land be forthwith removed by the Registrar of Titles.
>
> 5. Damages/compensation be assessed and paid by the applicant Goh Keng How, and the second defendant, Ho Choo Wing, to the first defendant Raja Zainal Abidin bin Raja Hussin under s. 329 of the National Land Code.
>
> 6. The Registrar of Titles Johor, and/or any proper registering authority, be directed under s. 417 of the National Land Code to register the 1st defendant Raja Zainal Abidin bin Raja Hussin as the proprietor of the said land notwithstanding any caveats, and in the event of any compulsory acquisition of the said land, the compensation or award be paid to the first defendant, Raja Zainal Abidin bin Raja Hussin by the Land Administrator or any other appropriate authority.
>
> 7. The applicant Goh Keng How and the second defendant Ho Choo Wing do jointly and severally pay to the first defendant Raja Zainal Abidin bin Raja Hussin the costs of and incidental to this application.

Several affidavits were filed on behalf of the parties. The material facts as to the decisive events forming the primary issues and the other material issues stated below appear not to be in dispute. The case was fully argued before

Abdul Malik Ishak J, with written submissions submitted by Counsel for both sides.

The learned Judge in a carefully considered reserved judgment dated 12 June 1995 found in favour of the respondent and made orders (A.R. 15-16) setting aside the order of 20 June 1994 which extended Goh's caveat and removing Goh's caveat and Ho's caveat, with costs and damages to be assessed. The learned Judge also made a vesting order vesting the said land in the name of the respondent, and he further ordered that the acquisition award of RM25,892,000 which was said to be deposited in Court in the Johor Bahru High Court in another Originating Summons No. 24-122-1995 be paid to the respondent. It is not clear from the record when the award was deposited in Court. At pp. 615 to 616 of the Appeal Record there is a copy of the Notice of award and offer of compensation in Form H, dated 28 January 1995 signed by the Land Administrator offering at p. 616 the sum of RM25,892,000 as full compensation for the acquisition of the said land. The appellants appealed to the Court of Appeal against the whole of the decision of the learned Judge, and the appeal came up for hearing before the Court on 18 and 19 of November 1996.

I have the benefit of reading the well researched written submissions submitted before the Court by learned Counsel for both sides. After the conclusion of the hearing of the appeal before the Court and after an adjournment for further deliberation by the Court on 19 November 1996, the Court unanimously dismissed the appeal with costs and affirmed the consequential vesting order made by the learned Judge. I now give my reasons for dismissing the appeal.

Two Primary Issues

The two primary issues before the Court are: (1) whether the respondent is an aggrieved person; and (2) whether Goh's and Ho's caveats should be removed, which calls for an enquiry into whether the appellants and the real claimants, Mingshu Syndicate, had any caveatable interest in the said land.

On the first primary issue, if the respondent is found not to be an aggrieved person within the ambit of the provisions of s. 327(1) of the National Land Code 1965 ('the Code'), the appeal must be allowed with costs and consequently the vesting order must be set aside. On behalf of the appellants, it was contended that the respondent was not an aggrieved person because he was not a *bona fid*e purchaser of the said land, he had notice of Goh's caveat, and the consideration of RM8 million appeared not to have been paid under the written sale and purchase agreement dated 25 June 1993 entered into between him and one Long Yoke Wee ('Long'). It was contended for the appellants that the entire transaction smacked of fraud and collusion. In this

connection, at the hearing of the appeal, the Court pointed out to Mr. Cecil Abraham, leading Counsel for the appellants, that in the statement of claim filed by Mingshu Syndicate, Goh and Ho as plaintiffs against Long and the respondent in Johor Bahru High Court Civil Suit No. 22-328-1994 (A.R. 558, 576-586), there is not even an allegation of fraud committed by the respondent or the attesting advocate and solicitor in the transaction. The authorities are clear that fraud and conspiracy to defraud must be proved beyond reasonable doubt, and fraud must be actual fraud: See *P.J.T.V. Denson (M) Sdn. Bhd. v. Roxy (Malaysia) Sdn. Bhd.* [1980] 2 MLJ 136, *Saminathan v. Pappa* [1981] 1 MLJ 121, *Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee* [1983] 1 MLJ 81, and *Aik Ming (M) Sdn. Bhd. v. Chang Ching Chuen* [1995] 2 MLJ 770 at 820. There is no evidence that the respondent had committed actual fraud in his transaction. Grave suspicion by the appellants is no proof of fraud. It is not in dispute that Long became the registered proprietor of the preceding title to the said land, i.e. the old Grant No. 339 on or about 17 November 1959 (A.R. 518) and the registered proprietor of the said land on 23 October 1967 (A.R. 539) free of any encumbrances, right up to the date of the sale and purchase agreement dated 25 June 1993 and that no instrument of trust had been deposited by Goh or Mingshu Syndicate with the Registrar of Titles, except the caveat of Goh which was entered in 1989.

The Code contains no definition on who is an aggrieved person. To my mind, the word "aggrieved" must be given its ordinary meaning. To be aggrieved means one is dissatisfied with or adversely affected by a wrongful act of someone. An aggrieved person is therefore a person whose legal right or interest is adversely affected by the wrongful act or conduct of another person or body. The category of aggrieved persons is never closed. The respondent had paid the full purchase price to Long under the sale and purchase agreement dated 25 June 1993, which was duly stamped and attested by an advocate and solicitor. There was Long's acknowledgement of receipt dated 17 June 1993 of the full purchase money of the sum of Ringgit Eight Million, witnessed by his wife, Madam Ong Lim Neo, and a Commissioner for Oaths (A.R. 427). Madam Ong had also affirmed a statutory declaration before the Commissioner for Oaths (A.R. 429) confirming the receipt by Long. At A.R. 537 appears a letter dated 1 March 1994 addressed to Development & Commercial Bank Berhad from the legal firm of Lee Chai Eng Haris & Co., Johor Bahru, confirming payment of the purchase price in respect of the said land. In the light of the above evidence, the Court accepted, as did the learned Judge, the fact that the full purchase money for the said land had been paid by the respondent to Long. I reproduce that letter of 1 March 1994 below:

The Manager
Development & Commercial Bank Berhad,
Menara TR, 161B, Jalan Ampang,
50450 Kuala Lumpur.

Dear Sir,

Re: Grant No. 21957, Lot 3523, Mukim Pulai, District of Johor Bahru
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We refer to the above matter.

We hereby confirm that the balance of the purchase price for above property have been fully settled.

We also confirm that the Four Million Ringgit sum under the special condition of the sale and purchase agreement have been fully settled.

The relevant transfer in Form 14A under the Code in respect of the said land (A.R. 435-437) duly executed by Long on 17 June 1993 and attested by an advocate and solicitor in favour of the respondent was given to the respondent together with the issue document of title for the said land. This was stated in para. 6 of the affidavit (A.R. 298) of the respondent. Long had done everything he could as registered proprietor to transfer or divest his entire interest in the said land to the respondent who had paid the full purchase price to Long. In my judgment, Long had thereby become a bare trustee holding the bare legal title to the said land on trust for the respondent who had become the beneficial owner thereof, within the bare trustee principle enunciated in *Temenggong Securities Ltd. v. Registrar of Titles, Johor* [1974] 2 MLJ 45, which was affirmed on appeal by the Privy Council in [1976] 2 MLJ 44, and applied in a number of subsequent leading authorities. In *Temenggong Securities,* H.S. Ong FJ said at p. 47:

> The law is clear that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the appellants (the purchasers) are bare trustees for the appellants of the said land.

In *Ng Keng Yeow v. Chiah Ah Foo* [1987] 2 MLJ 330, Lee Hun Hoe CJ (Borneo), in delivering the judgment of the then Supreme Court, said at p. 331:

> By paying the full purchase price the 4th respondent had become the beneficial owner. The first three respondents were merely bare trustees for the 4th respondent. There was therefore no interest against which the appellant's caveat could lie.

At p. 332, the learned Chief Justice said:

> The submission of the 4th respondent that he has better equity is well founded. He entered into the sale agreement with the vendors first. He had paid the full purchase price. The vendors had executed the Memorandum of Transfer in his favour. Also, most important the title deed is in his possession. He had become the beneficial owner. The only thing against him is that he entered the caveat later than the appellant. However, we are satisfied that on the facts he has the better equity.

In *Yeong Ah Chee v. Lee Chong Hai* [1994] 2 AMR 1945, Peh Swee Chin SCJ said in the then Supreme Court at pp. 1455-1456:

> It is an old and well-settled rule of equity that under a valid contract for sale of land, the beneficial ownership of the land passes to the purchaser who becomes the equitable owner; the vendor having a right to the purchase money for which he has a lien on the land. Please see *Lysaght v. Edwards* (1875-1876) 2 Ch. D 499 and this case was cited with approval very often in our Courts, e.g. by the Federal Court in *Intercontinental Mining Co. Sdn. Bhd. v. Societe Des Etains De Banyas Tudjuh* [1974] 1 MLJ 145 and *Temenggong Securities Ltd. v. Registrar of Titles, Johore* [1974] 2 MLJ 45. When the full purchase price is paid, the vendor becomes a bare trustee, i.e. unqualified trustee for the purchaser. It is also of salutary effect to remind ourselves of the fact that rules of equity apply to this country by the Civil Law Act 1956 and of the observation of Lord Russel of Killowen in *Oh Hiam v. Tham Kong* [1980] 2 MLJ 159 PC that
>
> > the Torrens system is designed to provide simplicity and certitude in transfer of land which is amply achieved without depriving equity of the ability to exercise its jurisdiction *in personam* on grounds of conscience.

In *Borneo Housing Mortgage Finance Bhd. v. Time Engineering Bhd.* [1996] 2 AMR 1537 the Federal Court had very recently the occasion to survey the authorities and restate the bare trustee principle at p. 1559 where Edgar Joseph Jr. FCJ said:

> In our view, the contractual events, which result in the vendor becoming a bare trustee of the land the subject matter of the agreement of sale and purchase for the purchaser, is on completion, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form, in favour of the purchaser, for it is then that the vendor divests himself of his interest in the land.

Ho's caveat, was entered very much later on 20 June 1994, i.e. well after the respondent had completed the transaction in 1993. Ho had not exhibited his caveat Form 19B. However, the respondent in para. 15 of his affidavit affirmed

on 16 July 1994 (A.R. 302) stated that Ho entered his private caveat "on the same or substantially the same grounds as the applicant Goh Keng How". This is also stated in para. 13 (A.R. 579) of the statement of claim of Mingshu Syndicate, Goh and Ho. Therefore Goh's caveat and Ho's caveat are in the same situation as representing the same interest of Mingshu Syndicate. The respondent affirmed in his affidavit of 16 July 1994 that Long had assured him "that all these three pieces of land were free from all encumbrances and that he would apply to the Registrar of Titles to remove the private caveat of the applicant, Goh Keng How". The respondent had no reason to disbelieve Long whose assurance he had relied upon. Before his death on 12 November 1994 (A.R. 141), Long did apply for removal of Goh's caveat to the Registrar of Titles who had issued a notice of intended removal of caveat in Form 19C to Goh, whereupon Goh applied for and obtained the *ex parte* order extending his caveat. Accordingly, I hold that the respondent was a *bona fide* purchaser for valuable consideration and that he was an aggrieved person entitled to make his application to the Court under s. 327(1) of the Code for the removal of Goh's caveat and Ho's caveat. (See *Attorney-General of Gambia v. Pierre Sarr N'Jie* [1961] AC 617 and *Temenggong Securities Ltd. v. Registrar of Titles, Johore* [1974] 2 MLJ 45).

I now come to the second primary issue which is crucial to the appellants' case, i.e. whether the two caveats should be removed. This necessarily calls for an enquiry into whether Goh, as the managing partner of Mingshu Syndicate, under s. 323 of the Code had stated the nature of his claim forming the basis of his application in Form 19B under s. 323(2), which had to be verified by his statutory declaration under s. 323(3). This important s. 323 merits full reproduction below:

323. Applications for entry of private caveats.

(1) The persons and bodies at whose instance a private caveat may be entered are:

(a) any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest;

(b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and

(c) the guardian or next friend of any minor claiming to be entitled as mentioned in para. (b).

(2) Any such person or body wishing to apply for the entry of such a caveat shall do so in Form 19B and such application shall be attested in accordance with the provisions of s. 211 and shall state therein the nature of the claim on which his application is based, and whether the caveat is to be expressed to bind the land itself or a particular interest only.

(3) Any application under this section shall be accompanied by the prescribed fee and, so far as it sets out the claim giving rise thereto, be verified by a statutory declaration by the applicant or his advocate and solicitor.

Paragraph 2 of Form 19B reads simply thus: "2. The grounds of my claim to the land/interest are ...". The basis of Goh's claim to the said land is best described in his own words in his para. 2 of Form 19B, which were quoted in para. 7 of the respondent's affidavit dated 16 July 1994 challenging the caveatable interest of Goh. The said para. 7 is reproduced below, with Goh's own words emphasised by me:

7. Prior to the signing of the said sale and purchase agreement, my search at the land registry on the said caveat did not reveal any caveatable interest of the applicant, Goh Keng How. It showed that the said Long Yoke Wee has for over a very long period of over thirty years been the registered proprietor of the said land without notice of any adverse claim to the title against him on the register document of titles in respect of the said land. At all material times there was nothing to show Long Yoke Wee's registered title was defective on the register document of titles. In his statutory declaration in support of the entry of the said caveat in 1988, Goh Keng How affirmed that para. 2 of his application was true and correct. There is nothing in the said para. 2 to show the proper basis of his claim, as the managing partner of 'Mingshu Syndicate'. The said para. 2 reads as follows:

The grounds of our claim to the land are that we claim a caveatable interest on the land referred to in the schedule hereto by virtue of certain document which clearly indicate our interest in the said land.

In the course of the hearing of the appeal, the Court indicated to Mr. Cecil Abraham that he would have to get over the hurdles of the judgment of the Court of Appeal in *Luggage Distributors (M) Sdn. Bhd. v. Tan Hor Teng* [1995] 2 AMR 969 in which my learned brother Gopal Sri Ram JCA propounded the three-stage approach to be adopted by Court in the hearing of an application by an aggrieved person under s. 327(1) of the Code for the removal of a private caveat. This approach in *Luggage Distributors* was applied by the Court of Appeal in *Murugappa Chettiar Lakshmanan v. Lee Teck Mook* [1995] 1 AMR 958. In *Luggage Distributors*, the learned Judge said on the first stage at p. 991:

The first stage is the examination of the grounds expressed in the application for the caveat. If it appears that the grounds stated therein are insufficient in law to support a caveat, then *cadit quaestio*, and the caveat must be removed without the necessity of going any further.

I may summarise that in the second stage the caveator must go on to show that, on the basis of the affidavits filed, his claim raises a serious question to be tried. The caveator must cross the first two hurdles before he can arrive at the third stage which deals with the question of balance of convenience or balance of justice.

As can be seen in the said para. 2 above, Goh had not disclosed what that so called "certain document" was. He chose to hide it from the world at large and it was as good as having nothing at all to show the caveatable interest he or Mingshu Syndicate claimed. He failed to disclose the instrument of trust in his caveat. Any person making a search on his caveat application form would have no notice of what the claim could be. The notice to the world at large would have been effective if Long had been registered "as trustee" under s. 344, with the trust instrument deposited with the Registrar of Titles under s. 344(3) of the Code. Mr. Cecil Abraham candidly admitted that he could not get over the first hurdle in *Luggage Distributors*. In my opinion, failure by a caveator such as Goh or Ho to cross that first hurdle would be sufficient for the Court to remove his caveat and dismiss his appeal, as I have no doubt in my mind that Goh, Ho, or Mingshu Syndicate had no caveatable interest in the said land. Accordingly, I dismissed the appeal with costs.

In the Court below, the learned Judge had found the respondent to be a *bona fide* purchaser having paid the full purchase price. The respondent had also in his summons in chambers in Prayer 6 above prayed to be registered "as the proprietor of the said land". The learned Judge ordered that the said land be vested in the name of the respondent.

It was contended on behalf of the appellants that because of the compulsory acquisition of the said land, the Court would be wrong to grant the vesting order. A short answer to that contention is that there is nothing in the Code or the Land Acquisition Act 1960 to prohibit the Court from making a vesting order consonant with the justice of the case. Section 327(1) of the Code permits the Court to make such other just order and under s. 417 the Court may by order direct the Registrar of Titles to give effect to the order. Section 420 of the Code makes provisions for the registration of a vesting order. Sections 327 and 417 read as follows:

327. Removal of private caveats by the Court

(1) Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court (acting, if the circumstances so require, *ex parte*) may make such order on the application as it may think just.

417. General authority of the Court

(1) The Court or a Judge may by order direct the Registrar or any Land Administrator to do all such things as may be necessary to give effect to any judgment or order given or made in any proceedings relating to land, and it shall be the duty of the Registrar or Land Administrator to comply with the order forthwith.

As a land reference Judge who had heard hundreds of land acquisition cases, I was interested to find out whether the said land had actually been acquired or there was only an intended acquisition at the material time. I examined a copy of the register document of title certified under s. 383(1) of the Code on Grant No. 21957 to the said land, exhibited as exh. RZA-7 to the affidavit of the respondent affirmed on 11 October 1995 and filed in this Court in opposition to the appellants' application for stay pending appeal to the Court of Appeal. That Grant No. 21957 showed an endorsement of the vesting order signed and sealed by the Registrar of Titles on 31 July 1995, vesting the said land in the name of the respondent and that the vesting order was presented for registration and was duly registered in Pelbagai 6004/95, Jilid 648, Folio 57, dated 28 July 1995, at 10.31 a.m. This fact appears in paras. 2 and 3 of the respondent's said affidavit reading as follows:

2. I crave leave to refer to the order of the Johor Bahru High Court dated 12 June 1995 wherein his Lordship Yang Arif Mr. Justice Dato' Haji Abdul Malik bin Haji Ishak ordered *inter alia* that the land known as Grant 21957 Lot 3523 Mukim of Pulai (hereinafter referred to as 'the said Land'), which is the subject of the above action, be vested in me.

3. On 28 July 1995, I presented the said order of Court through M/s. Gulam & Wong by their letter dated 28 July 1995 at the Johor Bahru Registry of Titles. A copy of M/s. Gulam & Wong's letter dated 28 July 1995 is now shown to me and is annexed hereto as exhibit "RZA-6". On 28 July 1995, the private caveats in question Jilid 895 Folio 58 and Jilid 352 Folio 86 were removed and the said land was duly vested in me as registered proprietor. A copy of the certified true copy of the register document of title to the said land is now shown to me and is annexed hereto as exhibit "RZA-7".

The effect of the vesting order is that the said land is beneficially owned by the respondent. Even assuming the said land had actually been acquired by the appropriate authorities upon the service of Form K when the learned Judge made the order on 12 June 1995, that acquisition does not take away the vested right of the respondent in the said land or any proceeds of acquisition or sale arising therefrom. There was an endorsement dated 2 July 1994 of an intended acquisition. However, there was no endorsement of the said land having actually been acquired as at 31 July 1995. On that date, the Registrar of Titles

had not made any memorial that the said land had been acquired under s. 23 of the Land Acquisition Act reading as follows:

> Entry in register
>
> 23. The proper registering authority, upon receipt of the notice in Form K, or the Land Administrator of his own motion after completing Form K, shall, upon the register document of title or other appropriate record in his possession as specified in s. 9(2) or (3), make with respect to any scheduled land a memorial:
>
> (a) that the whole of such land has been acquired and has vested in the State Authority; or
>
> (b) that so much of the land as is specified in the last column of the schedule to such Form has been acquired.

Registration of the vesting order with effect from 28 July 1995 would confer indefeasibility of title on the respondent under s. 340 of the Code and defeat or extinguish other unregistered equitable interest in respect of the said land.

In *Bachan Singh v. Mahinder Kaur & Anor*. [1956] MLJ 97, a decision under the repealed FMS Land Code, the applicant Bachan Singh had obtained the transfer from the first respondent Mahinder Kaur but was unable to register it for technical reasons which appear in the judgment of Thomson J (as he then was). In directing the applicant to be registered as proprietor of 30/147 undivided shares in the Land in question, the learned Judge said in the course of his judgment at pp. 97 and 98:

> To my mind, many of the difficulties which appear to arise in these cases would not arise if we were to bear in mind throughout the distinction between rights *ad rem* or personal rights and rights *in rem* or real rights. Where there is a valid binding contract for the sale of Land, the purchaser when he has performed his side of the contract, acquires a right *ad rem* which is also a right *in personam.* In other words, he acquires a right to the land as against the vendor personally but not good against the world as a whole and, in due course, that right can become a real right good against the world as a whole on registration in accordance with the Land Code ...
>
> ... If he wishes to deal with these rights by vesting them in or rather transferring them to himself and taking the necessary step to convert them into real rights he is entitled to do so. He is, however, unable to do so for technical reasons which are abundantly clear – the failure to register timeously the original transfer and the death of one of the parties from whom his authority flows. It seems to me that what he is doing here is to invoke the powers given to the Court by s. 240 of the Land Code to enable him to surmount these technical difficulties.

In view of the then pending compulsory acquisition of the said land, Mr. Wong Kim Fatt, leading Counsel for the respondent, submitted that the learned Judge was right in the circumstances to make the vesting order, and that had there been no caveats entered by Goh and Ho, the transfer of the said land in Form 14A would have been registered in favour of the respondent in the usual way. I agreed with Mr. Wong and the learned Judge and therefore affirmed his vesting order.

The Court invited Mr. Abraham and Mr. Wong to address the Court on the question of payment of the award of RM25,892,000 to the respondent. Although the effect of the vesting order would make the respondent the beneficial owner of the said land, after hearing Mr. Abraham and Mr. Wong on the order of payment of the said award out of Court to the respondent, the Court agreed with Mr. Abraham and set aside the order of payment of the award to the respondent made by the learned Judge in the Originating Summons No. 24-440-1994 from which this appeal arose, as the Court was of the opinion that the proper procedure is for the respondent to apply to the Johor Bahru High Court for an order for payment out to him in the other appropriate Originating Summons No. 24-122-1995 in which, on the application of the Land Administrator, Johor Bahru, the order for payment into Court of the compensation award of RM25,892,000 was made for the compulsory acquisition of the said land. The respondent accepted this part of the Court's decision as he had not applied for leave to appeal against it and I need say nothing more on it.

Other Issues

The appellants must have accepted the Court's decision on the above two primary issues which the Court unanimously found in favour of the respondent, as they have not sought leave from the Federal Court to appeal against that decision which disposed of the appeal by the appellants. However, if this Court is wrong in dismissing the appeal with costs on the above two primary issues, I now proceed to consider several other material issues raised before the Court in the written submissions of Counsel on behalf of the appellants and the respondent. These issues had been fully considered by the learned Judge. In my judgment, upon a careful consideration of these issues and of the respective written submissions, I would also have dismissed the appeal with costs on the following grounds.

Mingshu Syndicate. The first of these issues that came to my mind is the entity called "Mingshu Syndicate" which features throughout these proceedings. The appellants claimed that by a trust instrument dated 2 July 1963 (A.R. 407) executed by Long, he held 43000/152900 undivided shares in the larger lot of land known as Lot No. 254 held under the old Grant No. 339 (A.R. 516-

519), District of Johor Bahru, on trust for Mingshu Syndicate. There were provisions with the object of giving notice to the world at large under s. 72(i) of the now repealed Johore Land Enactment for the registration of Long "as trustee" and for the deposit of the trust instrument but unfortunately for Mingshu Syndicate this was never done in respect of the old Grant No. 339 issued under the Enactment which was repealed by the Code as from its commencement. This material omission under the Torrens system would result in a serious prejudice to a person making a title search in the registry in that he would never know that Long was a trustee for Mingshu Syndicate. This omission on the part of Mingshu Syndicate must be held against it. Section 72(i) of the Enactment reads as follows:

> 72(i) When the proprietor of any land shall transfer the same to trustees, the Commissioner shall not make any entry in the register of the trusts, but he shall register the fact that the persons in whose favour the instrument is granted are trustees by adding the words "as trustees" after their names and designations in the register; and the instrument creating the trust, or a duplicate or certified copy thereof, may be deposited in the registry for safe custody and reference.

I now reproduce the relevant paragraphs of the trust instrument dated 2 July 1963 below:

> AND WHEREAS I, LONG YOKE WEE (I/C No. S555085514) of No. 16, Puey Hoe Avenue, Singapore, stand seised of 43000/152900 undivided share right title and interest in all that piece of land containing an area of 1,529 acres 0 roods 00 poles or thereabouts and situated in the Mukim of Gelang Patah in the District of Johor Bahru and comprised in the Government of Johor Grant No. 339 for Lot No. 254 (hereinafter referred to as "the said land").
>
> Now, I the said LONG YOKE WEE hereby acknowledge that all the share capital and assets of the said company as well as the said land whereof I stand seised of 43000/152900 undivided share right title and interest therein RIGHTFULLY belong to the said company AND I hereby for myself, my heirs, executors and administrators and assigns declare that I have no interest claim or demand in respect of my said share in the said land and the share capital and assets of the said company.
>
> Dated at Singapore this 2nd day of July 1963.

The affidavit of Goh affirmed on 1 October 1994 (para. 8, A.R. 371) shows that Mingshu Syndicate was registered as a partnership on 19 June 1963. I reproduce that para. 8 below:

> 8. In reply to para. 9 of the Proposed Intervener's Second Affidavit, I am advised and verily believe that Mingshu Estate and Johor Farms and Plantations was the name used by an unregistered partnership of a group of entreprenuers which was later registered on 19/6/1963 under the name Mingshu Syndicate

a and carried on business as before. Therefore I verily believe that Mingshu Estate and Johor Farms and Plantations is the same as Mingshu Syndicate.

The official search on Mingshu Syndicate (Exh. RZA-12 at A.R. 455-460) shows, and it is common ground, that Mingshu Syndicate was registered as a partnership on 19 June 1963. The search shows that it commenced business b four days earlier on 15 June 1963. There is no evidence to show that Mingshu Estate and Johor Farms and Plantations was ever registered or is the same entity as Mingshu Syndicate. On the face of it, they are two different entities. At the material time on 15 or 19 June 1963, Goh and Ho were not partners of Mingshu Syndicate and had therefore no interest therein on those dates: c see *Yeong Ah Chee v. Lee Chong Hai* [1994] 2 AMR 1445 on the three essentials of a valid trust. These two gentlemen became its partners only in the following year on 16 January 1964 (see Goh's affidavit, para. 10, A.R. 323, and A.R. 456-457). On the evidence before the Court, I regret to state that there was no written partnership agreement produced, and there was no d proof to show that there was an agreement between the existing partners made for the partnership to continue in the event of the death of any partner. Absence of an agreement for the partnership to continue in the event of death or bankruptcy of any partner would expose the partnership like Mingshu Syndicate to a very precarious situation as an on-going business concern, e because the law relating to the dissolution of partnership upon the death or bankruptcy of a partner would apply eventually to Mingshu Syndicate: see *Khoo Yoke Wah v. Lee Choon Yam Holdings Sdn. Bhd.* [1991] 1 CLJ 663, *Mat Shah b. Mohamed v. Foo Say Meng* [1984] 1 MLJ 237, 239, and s. 35(1) of the Partnership Act 1961 which provides as follows:

f 35(1) Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner.

As time went on, it took its toll against Mingshu Syndicate as its partners had not taken the precaution to make the necessary agreement catering for g the partnership to continue in the event of the death or bankruptcy or any one partner. Unfortunately, as far back as over 30 years ago, on 18 May 1965, one Tan Geok Gim, a partner of Mingshu Syndicate, died (A.R. 460), thereby dissolving Mingshu Syndicate as a partnership under s. 35(1) of the Partnership Act 1961. To make the situation worse for Mingshu Syndicate, another partner, h one Lee Ah Soo died the following year on 28 November 1966 (A.R. 460) and some 29 years later on 8 May 1995 Goh himself died. Thus on the undisputed evidence before this Court and before the Court below, I have no other choice except to hold that Mingshu Syndicate was dissolved on 18 May 1965 when the first death of a partner occurred. I may also state that a

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partnership firm is not a legal persona (see *Madan Lal v. Ho Siew Bee* [1983] 1 MLJ 105). Further under s. 43 of the Code, a partnership like Mingshu Syndicate is not a person or body which can hold land in its own name. Section 43 reads as follows:

> 43. Persons and bodies to whom land may be disposed of.
>
> Subject to the provisions of Part Thirty-Three (A), the powers of disposal conferred on the State Authority by s. 42 may be exercised only in favour of, and application for their exercise may be accepted only from, the following persons and bodies:
>
> (a) natural persons other than minors;
>
> (b) corporations having power under their constitutions to hold and;
>
> (c) sovereigns, governments, organisations and other persons authorised to hold land under the provisions of the Diplomatic and Consular Privileges Ordinance 1957;
>
> (d) bodies expressly empowered to hold land under any other written law:
>
> Provided that it shall not be necessary for a corporation to have power to hold land in order for it to be able to apply for, and be issued with, a permit to extract and remove rock material.

Limitation and Laches. The next material issue of relevance which I need consider is on limitation and laches raised on behalf of the respondent. Goh had stated in his affidavit dated 13 June 1994 (para. 4, A.R. 285) that on 2 November 1968, Long had agreed to deliver but failed to deliver by **4 November 1968** the blank transfer form relating to the said land. This undisputed material fact was reaffirmed by Goh in para. 5 of his subsequent affidavit of 11 August 1994 (A.R. 320) reproduced below:

> 5. Further at a meeting of partners of Mingshu Syndicate held on 2 November 1968 Long Yoke Wee agreed to transfer the title deeds including the title deeds of the said land belonging to Mingshu Syndicate held in trust by him to Mingshu Syndicate. He also agreed to hand the blank transfer forms pertaining to the abovesaid transfers to Mingshu Syndicate's solicitors by **4 November 1968. However, he failed to do so**. A copy of the Acknowledgement at the meeting on 2 November 1968 has been exhibited as exhibit "GKH-2" to my affidavit affirmed on 13 June 1994 filed herein. (Emphasis added).

This affidavit of Goh is a double-edged sword. Understandably, it was intended to strengthen his case and to show that, as demanded by Mingshu Syndicate, Long had agreed to give back the said land to Mingshu Syndicate by transferring it to the Syndicate by the stipulated date on 4 November 1968.

However, Long had, in the words of Goh, "failed to do so". This failure on Long's part should have triggered off timeous legal action on the part of Goh, Ho or Mingshu Syndicate. It was contended for the respondent that the cause of action accrued when Long failed to deliver the transfer forms and the issue documents of title on 4 November 1968. It was contended for the appellants that Mingshu Syndicate's cause of action accrued very much later on 25 June 1993 when Long sold the said land to the respondent. It appeared clear to me that Mingshu Syndicate's cause of action for the recovery of the said land accrued when Long had failed or defaulted to deliver the transfer and the issue document of title to the said land on **4 November 1968** when time began to run. In order to prevent limitation from setting in, Mingshu Syndicate, assuming it had the legal capacity, must institute its action within twelve years from 4 November 1968. This it clearly failed to do, and it has only itself to blame. The provisions of s. 9 of the Limitation Act 1953 are clear. It reads as follows:

> 9. Limitation of actions to recover land.
>
> (1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.

The appellants and Mingshu Syndicate filed their claim in their very untimeous Civil Suit No. 22-328-1994 (A.R. 558) against Long and the respondent as defendants on 19 October 1994 in the Johor Bahru High Court for the recovery of the said land which was registered in the name of Long as proprietor free of any trust or encumbrances on 23 October 1967 (A.R. 529). As the civil suit affects adversely the beneficial interest of the respondent in the said land and consequently his right to receive the said award of RM25,892,000, he is entitled, as an aggrieved person, to raise the question of limitation which had set in twelve years after 4 November 1968, i.e. on 4 November 1980. The learned Judge was not precluded from deciding the relevant issues before him, as all the interested parties were before him. Thus, the claim of the appellants and Mingshu Syndicate in their Civil Suit No. 22-328-1994 was filed some fourteen long years out of time and was barred by limitation.

I agree with the learned Judge for his reasoning that Goh, Ho, and Mingshu Syndicate are also barred by laches from asserting their interest in the said land as against that of the respondent. The learned Judge, after referring to the Privy Council case of *Lindsay Petroleum Company v. Prosper Armstrong Hurd* [1874] 5 LR 221 and the English Court of Appeal case of *Allcard v. Skinner* [1887] 36 Ch. D. 145, said at pp. 55 to 56 of his judgment:

> Just like *Allcard v. Skinner (supra)*, it would truly be unjust after almost 30 years to allow the alleged beneficiaries to assert their interests to the said land as against that of Raja Zainal Abidin. Goh, Ho and the other alleged beneficiaries were businessmen, intelligent, fully aware of their legal rights and most importantly they had legal advice on the matter. It must be inferred that when Long refused to hand over the blank transfer forms on 4 November 1968, they had the advantage of legal advice and they chose to let Long continue to be the registered proprietor of the said land. Bluntly put, they have acquiesced Long's title to the said land for almost 30 years and now they are estopped and barred by laches from asserting their alleged interests.

It is most unfortunate that Goh, Ho and Mingshu Syndicate have only themselves to blame for the limitation and laches on their part. The respondent had nothing to do with the limitation and laches.

Negligent acts and omissions of Mingshu Syndicate. By allowing the preceding title Grant No. 339 to be registered in the name of Long as proprietor and not as trustee in 1959 and allowing the present title Grant No. 21957 to the said land to be registered in the name of Long in 1967 also as proprietor, and not as trustee under s. 344 of the Code, and in failing to deposit the trust instrument with the Registry of Titles, and in allowing Long to retain possession of the issue document of title, Mingshu Syndicate was clearly guilty of negligence or omission in arming Long with full power to deal with the said land as proprietor over an incredibly long period of time. If Mingshu Syndicate has any prior equity in the said land, it must be postponed to that of the respondent. Clearly the decision in the well-known Privy Council case of *Abigail v. Lapin* [1934] AC 491 is against the appellants.

Under s. 89 of the Code, the register document of title is conclusive evidence of title: see *Teh Bee v. Maruthamuthu* [1977] 2 MLJ. Anyone making a title search in the Registry would find Long as the registered proprietor, free of encumbrances and free of any trust, except the defective caveats of Goh and Ho. They failed to state in their applications that the said land was subject to a trust and they are now estopped from relying on the trust against the respondent who would be prejudiced or misled by the misconduct of Goh and Ho. In this regard the learned Judge at A.R. 39-40, referred to *Sim Kwang Mui Ivy v. Goh Peng Khim* [1995] 1 SLR 186, in which Kan Ting Chiu J in the High Court of Singapore decided that a caveator would not be permitted to justify his caveat on grounds other than those stated in the caveat. On appeal, the decision was affirmed by the Singapore Court of Appeal. Had Goh or Ho entered or caused the entry of a trust caveat under ss. 332 and 333 of the Code, the trust caveat would serve to give notice to the world at large that the said land was subject to a trust. By itself a private caveat is not a remedy, and it does not create an interest in land. The caveat temporarily

freezes the register document of title until timeous legal action is instituted for the determination of the dispute. Counting from 1959, when Long became the registered proprietor of the old Grant No. 339 (A.R. 518) Mingshu Syndicate had armed Long with the preceding title to the said land and represented to the world at large that Long was the beneficial owner thereof free of any trust for an unprecedented and incredibly long period of over 33 years up to 1993 when the respondent purchased the said land under the sale and purchase agreement. Counting from 23 October 1967 when the new Grant 21957 (A.R. 539) was registered in the name of Long free of any trust the period would still be a very long one of some 25 years up to 1993 when the respondent executed the agreement. The learned Judge had in pp. 61 and 62 of his judgment summarized under six items the acts or omissions of Goh or Ho or Mingshu Syndicate which "had the effect of inducing Raja Zainal Abidin to act to his prejudice." I respectfully agree with his findings.

No serious question to be tried. The onus was on the respondent Raja Zainal Abidin, as he was not the registered proprietor of the said land at the time of his application, to show how he was an aggrieved person under s. 327(1) of the Code. The procedure and onus for removal of a caveat under ss. 326 and 327 of the Code had been clearly stated by Lord Diplock in the Privy Council case of *Eng Mee Yong v. Letchumanan* [1979] 2 MLJ 212, at 215. Once the respondent had satisfied the Court that he was a person aggrieved by the existence of the caveats (which he had), the onus would be on Goh and Ho as caveators to satisfy the Court that their claim and that of Mingshu Syndicate had raised serious questions to be tried in their said civil suit, and having so satisfied that Court, the appellants as caveators must go on to show that, on the balance of convenience, it would be better to maintain the caveats until the trial of the civil suit.

A copy of the writ dated 19 October 1994 in the Johor Bahru High Court Civil Suit No. 22-328-1994 filed by Mingshu Syndicate, Goh, and Ho as plaintiffs is exhibited by their solicitor at A.R. 558 to 560. The statement of claim dated 18 October 1994 in Bahasa Malaysia and English appears at A.R. 564-586. The two defendants to this suit are Long and the respondent, Raja Zainal Abidin bin Raja Hussin. According to the affidavit affirmed on 28 January 1995 of Miss Rosita Yeo Swat Geok, solicitor for the plaintiffs, the writ had not been served on the defendants by the date of her affirmation (A.R. 562). The learned Judge at A.R. 88 observes, "On 19 October 1994 Long was still alive, he died only on 12 November 1994 and yet there was no attempt to serve the writ." In a nutshell, Mingshu Syndicate in the civil suit is seeking the recovery of the said land. It was the contention of the appellants that the question of the disputed facts, competing equity, limitation and laches should

not be enquired into in the originating summons but rather at the trial of the civil suit. They contended that there were triable issues in the suit. It was contended otherwise on behalf of the respondent.

In my judgment, all interested parties in respect of the claim to the said land were before the learned Judge, i.e. the appellants claiming the said land for Mingshu Syndicate as its partners, and the respondent as the purchaser having paid the full purchase price for the said land and aggrieved by the existence of the private caveats of Goh and Ho. No trial is necessary to determine if the respondent is an aggrieved person. The appellants, admittedly, could not even get past the first hurdle in the *Luggage Distributors* case. In other words, the appellants and Mingshu Syndicate had no caveatable interest in the said land. Thus, on this issue alone, the caveats must be removed and this too does not require a trial. On the above two primary issues found in favour of the respondent, the situation is even clearer now that they do not form triable issues since the appellants have not sought leave to appeal to the Federal Court. There is also no need to have a trial on the dissolution of Mingshu Syndicate on the deaths of its partners as the facts are not in dispute and the law is clear. The accruel of the cause of action on 4 November 1968 and the question of limitation and laches are based on the undisputed affidavit evidence of Goh himself. The said Civil Suit No. 22-328-1994 was, as stated before, filed some 14 long years out of time. No trial is required to determine this obvious fact. I therefore hold that on the above primary and material issues, there is no serious issue to be tried in the civil suit, and the question of balance of convenience or balance of justice does not arise.

Reported by WA Sharif

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